REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 148 OF 2019

ORACLE SYSTEMS LIMITED (KENYA BRANCH) .....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a branch of Oracle Systems Limited (OSL), a limited liability company incorporated in Cyprus under the applicable laws of Cyprus to distribute Oracle products.

2. The Respondent is a principal officer of the Kenya Revenue Authority, a public body, duly established under the Kenya Revenue Authority Act (Chapter 469 of the Laws of Kenya), whose primary duty is the collection and accounting for Government revenue.

3. The Respondent issued a notice of intention to audit the Appellant's operations for the period 2013 to 2014 in a letter dated 18th May 2018. Following the audit, the Respondent issued a notice of assessment dated 3rd January 2019 in which it demanded for payment of principal tax, penalties and interest amounting to Kshs. 1,928,805,299.00 in respect of Corporation Tax, Pay as You Earn (PAYE) taxes and Value Added Tax (VAT).

4. The Appellant objected to the entire assessment vide a Notice of Objection dated 1st February 2019. Subsequently the Respondent issued its Objection Decision dated 20th February 2019 wherein the amount demanded in relation to Corporation Tax, PAYE and VAT amounted to Kshs. 1,683,093,024.00.

5. Being aggrieved by this decision the Appellant lodged this Appeal vide the Memorandum of Appeal and Statement of Facts both dated 4th April, 2019 and filed before the Tribunal the same day.

THE APPEAL

6. The Appeal was premised on the following grounds:

   i. That the Respondent misapprehended the Appellant's functional profile and wrongly attributed income to the Appellant.
   ii. That the Respondent wrongly applied the arm's length principle to the dealings between the Appellant and Oracle Systems Limited.
   iii. That the Respondent failed to take into account the Appellant's functional profile in its benchmarking analysis and the determination of the 35% sales commission.
   iv. That the Respondent failed to take into account the requisite comparability factors in their application of the Comparable Uncontrolled Price method, to the Appellant's operations.
   v. That without prejudice to the foregoing grounds, the Respondent failed to take into account the Withholding Taxes paid by Oracle Systems Limited.
   vi. That the Respondent wrongly treated the dealings between the Appellant and Oracle Systems Limited as constituting a supply of services for VAT purposes.

vii. That the Respondent wrongly demanded VAT on services used and consumed outside Kenya.

viii. That the Respondent wrongly imputed a compensation to the Appellant on sales made by Oracle Technology Systems (Kenya) Limited in Kenya.

ix. That the Respondent failed to take into account the double taxation effect of their tax demand on the services provided to OSL.

x. That the Respondent wrongly demanded interest that was computed on an incorrect tax demand.

xi. That The Respondent wrongly assessed PAYE taxes on mobile phone and home internet expenses of the Appellant.

7. In the course of the Appeal process, the parties to this Appeal reached a settlement on 3rd August 2020 (filed before the Tribunal on 6th August 2020) in relation to the Corporation Tax and PAYE issues raised in the demand. This Judgement will therefore focus entirely on the arguments of the parties and the determination of this Tribunal in relation to the pending issue of the VAT Assessment.

The Appellant's Case

8. The Appellant argued the following issues upon which it based its submissions:

i. The Respondent wrongly treated the dealings between the Appellant and Oracle Systems Limited as constituting a supply of services for VAT purposes.

ii. Without prejudice to the foregoing, that the Respondent wrongly demanded VAT on services used and consumed outside Kenya.

i) The Respondent wrongly treated the dealings between the Appellant and Oracle Systems Limited as constituting a supply of services for VAT purposes.

9. The Appellant averred that as a branch the Appellant is considered an extension of the head office (OSL) in Kenya and thus legally not a separate entity. This is premised on the provisions of Sections 974 and 975 of the Companies Act No 17 of 2015 which are equivalent to the provisions of Sections 365 and 366 of the repealed Companies Act Cap 486 and various provisions of the VAT Act 2013.

10. The Appellant cited Section 974(1) of the Companies Act which states that:

"A foreign company shall not carry on business in Kenya unless- a) it is registered under this Part..."

11. The Appellant further referred to Section 975(1) provides that:

"Subject to this Part, a foreign company that wishes to be registered as a foreign company shall lodge with the Registrar an application that is in accordance with this Division."

12. From the above provisions, the Appellant was of the view that as a branch of OSL, it was not a distinct entity but an extension of a foreign company that wishes to be registered to carry on business in Kenya. Accordingly, functions performed by the Appellant on behalf of OSL cannot be construed as a supply chargeable to VAT.

13. The Appellant submitted that VAT is only chargeable when a supply is made to another person. The definition of a "person" under Section 2 of the VAT Act is extensive and exhaustive. It defines a person to mean:

"an individual, company. partnership, association of persons, trust, estate, the Government, a foreign government, or a political subdivision of the government or foreign government."

14. The Appellant submitted that the list in Section 2 of the VAT Act could easily have included but does not include a *branch*. It is therefore evident that a branch is not a separate legal entity from its head office and therefore activities of the branch cannot constitute services rendered to another person.

15. Additionally, the Appellant relied on Section 2 of the VAT Act which defines a supply of services to mean:

> *"anything done that is not a supply of goods or money, including the performance of services for another person..."*

16. The Appellant submits that in the present case, because the Branch is not a separate legal entity from OSL, then activities undertaken by the Branch cannot constitute a 'supply of services' because they cannot be done for 'another person'.

17. The Appellant noted that the Respondent has countered this argument by contending that the Branch was registered in Kenya for VAT purposes and issued with a VAT registration number while OSL was not and thus the two are separate for VAT purposes. The Appellant submitted that in making this argument, the Respondent failed to appreciate that OSL and the branch are a single entity as a Branch is not a 'person' under Section 2 of the VAT Act. That accordingly, the registration of the Branch is simply the registration of OSL, and the branch is simply the part of OSL that is located in Kenya.

18. The Appellant relied on the **Danone Baby Nutrition Africa and Overseas vs The Commissioner of Domestic Taxes TAT Appeal No. 28 of 2018** whose facts are relevantly identical to the case at hand and that therefore the outcome in the current Appeal ought to be similar. In the **Danone case**, the Respondent argued that services rendered by a Branch of Danone to its head office in France should be subject to VAT. The Honourable Tribunal

disagreed with the Respondent and cited Section 2 of the VAT Act in concluding that:

"Accordingly, for a service to be deemed to be a supply made in Kenya and therefore subject to VAT, it must in the first part, entail the performance of a service for another person".

The problem, the Tribunal noted, is that *"a close reading of the provisions defining a person indicate that a Branch is not included in that definition".*

19. The Tribunal therefore concluded that *"[B]ranches are deemed to be one and the same person as the head office and payments between them cannot be seen as payments between two persons. The current wording of the VAT Act provides that services must be performed by one person for another person. In this case, since the branch and the head office are deemed not to be separate entities, then it is impossible for the condition to be fulfilled...[S]ince the Appellant and its head office were not separate persons then there could not have been a supply of services as envisioned under the VAT Act. Accordingly, there was no vatable supply."*

20. That the Judgment above by the Tribunal mirrored that of the European Court of Justice in **FCE Bank Plc v Italian Ministry of Finance 2006 E.C.R I-01823** in which the court held that *"a fixed establishment, which is not a legal entity distinct from the company of which it forms a part* [i.e. a branch], *established in another Member State and to which the company supplies services, should not be treated as a taxable person... in respect of those supplies".*

i.

21. The Appellant therefore submitted that for these reasons, the VAT which pertains to alleged services rendered by the Branch to OSL were imposed erroneously by the Respondent.

ii) The Respondent wrongly demanded VAT on services used and consumed outside Kenya.

22. The Appellant submitted that notwithstanding and without prejudice to the foregoing, even if there was a provision of services by the Branch to OSL (which is denied), these were exported services that should be zero-rated for VAT purposes since the benefit of the services accrued outside Kenya and therefore the use or consumption of the services was outside Kenya.

23. The Appellant further argued that applying the destination principle as set out in the OECD VAT/GST Guidelines, the location of the consumer was outside Kenya and therefore Kenya is not the correct jurisdiction to charge VAT. Notably, the Respondent collects VAT on the value created by the Branch's services later in the chain of transactions when Oracle products are sold to end users in Kenya, consistent with the destination principle.

24. The Appellant relied on Section 2 of the VAT Act defines an exported service as

"a service provided for use or consumption outside Kenya."

25. That notably, a service having been performed in Kenya is fully consistent with that service having been used or consumed outside Kenya and therefore exported. The Appellant gave an example of where someone in Kenya investigates the demand in the Kenyan market for software products for a software company in a foreign country, those services are performed in Kenya but used or consumed abroad and are therefore exported. In other words, Kenya observes the *Destination Principle* consistent with international practice.

26. The Appellant stated that its activities entailed demand generation and business development activities, which involved carrying out activities of gathering market intelligence for OSL. These functions were used by OSL in

Cyprus and non-resident in Kenya to whom the benefits of the service accrued.

27. The Appellant submitted that the Respondent in its Objection Decision relied on the Tribunal's decision in **Coca-Cola East and West Africa Limited v Commissioner of Domestic Taxes (TAT No. 11 of 2013).**

28. This fact was also confirmed by the Respondent's witness on cross examination. The decision of the Tribunal has since been overturned by the High Court in **Coca Cola v Commissioner of Domestic Taxes Tax Appeal No. 19 of 2013 (the Coca Cola Case).**

29. In the **Coca Cola Case**, the High Court noted that advertising services seen in Kenya by potential consumers were provided pursuant to an agreement between one business and another, noting that the OECD guidelines counsel that one should look to the business agreement to identify the user of services. It held that the services were not used or consumed in Kenya, notwithstanding that those advertising services were paid for the foreign business entities and benefitted them as well.

30. That the High Court identified the deeper policy behind this rule, which is to avoid unintended double taxation. If VAT were imposed on advertising services obtained and paid by a foreign company, then that foreign company would recoup that expense by increasing the amount it charged for imports into that market. This would then result in the double imposition of VAT on such services once upon the export of the service by it and again upon import of the concentrate by the bottler.

31. The Appellant submitted that the same reasoning applies in this case. Not only is it correct statutory interpretation to deem (alleged) services performed locally (by a Branch) for the benefit of its head office abroad,

but also Kenya does not lose out on VAT properly imposed on Oracle products sold here. The services are performed by OSL which then imports Oracle products. Thus, when Oracle products are sold here, Kenyan VAT is charged to the customer in Kenya so that the value added by Branch services is correctly and properly subject to Kenyan VAT. Thus, just as in the **Coca Cola Case**, it is not the case that the arrangement avoids or minimizes VAT and there is no reason for the Tribunal to deviate from the principles outlined in the OECD Guidelines.

32. The Appellant submitted that the Tribunal has also rejected the Respondent's approach in **LG Electronics v Commissioner (Tax Appeal No. 369 of 2018),** holding that marketing services performed in Kenya were used and consumed by the company's head office overseas, and not be local distributors or Kenyan customers.

33. The Appellant also stated that the Respondent failed to take into account the double taxation effect of the VAT demand. It averred that any VAT applicable should be levied on OSL and not the third parties. If the VAT to be so levied on OSL should be at 16% as demanded by the Respondent, this would result in a double taxation of the end consumers of OSL's products/services and defy the VAT. To support this, the Appellant relied on the expert testimony of Professor Rebecca Millar. In the testimony, the expert stated that the key to proper interpretation of VAT law is the Destination Principle. For the international VAT system to operate correctly, the burden of VAT should be borne by the final consumer. This achieves the aim of the system-for VAT burden to be borne only once by the final consumer and based on all of the value created along the chain of economic production that proceeds along toward the final sale to the final consumer. A corollary of this principle is that there should be no net VAT on business-to-business transactions.

34. The Appellant submitted that in the purely domestic context, VAT paid early in this chain of value can be recouped via input credits from sales along the chain. But in the cross-border context where there are multiple potential taxing authorities, this becomes more complicated. The simplest solution to this problem is just not to tax such transactions. This does not create tax avoidance.

35. That as long as VAT is imposed based on the sale price on the end consumer of the product, VAT will be imposed on the full value of all goods and services that contributed to the sale. The problem emerges in the cross-border context when this system is threatened by non-refundable or offset able VAT being remitted to different taxing authorities. This problem is solved by zero rating exports.

36. The Appellant further argued that the Respondent wrongly imputed a compensation on the Appellant on sales made by Oracle Technology Systems (Kenya) Limited in Kenya. The Appellant also pointed out that the Respondent's witness Martin Tswala admitted that the VAT claim was based on a transfer pricing claim which he admitted had been vacated as evidenced by the consent filed before the Tribunal on 6th August 2020.

The Appellant's prayers

37. The Appellant therefore prays that:

    i. The Appeal be allowed.
    ii. The Objection Decision by the Respondent on the VAT assessment be annulled.
    iii. The costs of the Appeal be awarded to the Respondent.

RESPONSE TO THE APPEAL

38. The Respondent in response to the Appeal filed a Statement of Facts dated the 3rd day of May, 2019 and filed on the same date.

39. As relates to the VAT assessment the Respondent opposed the Appeal on the basis of the grounds to be highlighted in the consideration of its case hereunder: -

The Respondent's Case

40. The Respondent averred that the Appellant was registered for VAT on 2nd March 2007 and allocated VAT registration number 0168701Q. Further, the Appellant was providing sales/marketing services in respect of which it should have been remunerated. These services are a taxable supply for VAT purposes. However, the Appellant did not declare VAT on this supply. The portion of sales and marketing services provided in Kenya should have been taxed at a standard rate of 16% while the services rendered outside Kenya were deemed to be exports chargeable at 0% VAT.

41. In response to the Appellant's assertions, the Respondent submitted as follows:

a) The Respondent wrongly treated the dealings between the Appellant and OSL as constituting a supply of services for VAT purposes.

42. In response to the Appellant's assertion that the transactions between itself and OSL (its head office) do not constitute a supply for VAT purposes since a branch is not a separate entity, the Respondent stated that Section 2 of the VAT Act defines a registered person as:

> *"any person registered under Section 34, but does not include an export processing zone enterprise or a special economic zone".* Since the Appellant is registered for VAT and allocated a VAT registration

number, it was thus considered to be a registered person for VAT purposes."

43. That the VAT Act defines a supply of services as "anything done that is not a supply of goods or money, including the performance of services for any other person." Section 8 of the VAT Act further provides that a supply of services is made in Kenya if the place of business of the supplier from which the services are supplied is in Kenya."

b) The Respondent wrongly demanded VAT on services used and consumed outside Kenya.

44. In response to this ground, the Respondent relied on the case of **Coca-Cola East and West Africa Ltd Vs Commissioner of Domestic Taxes (Appeal No. 11 of 2013).** On the issue of whether requisition or payment of services amounted to consumption, the Tribunal in that case held that just because a non-resident requisitioned the services from Coca Cola, it did not mean it was necessarily the consumer of those services. The Tribunal stated that consumption or use of a service is not determined by reference to the location of the payer or person requisitioning the service but what is pertinent is the location of the consumer of the services and thus the location of the payer is immaterial. According to the VAT Tribunal, what is material is whether the supplier of the service has established a business or permanent establishment in Kenya and whether the services are consumed in Kenya.

45. That in addressing the issue of who the consumers of the service were, the Tribunal held that households in Kenya were the final consumers of the advertising and promotion services leading to the eventual purchase of the product being advertised. What is important therefore is the place of consumption and not the location of the person who earns revenue from

the services undertaken. Consumption was therefore to be determined by anybody who puts a service to any use. As such, even parties that were not privy to the transaction could be found to the ultimate consumers of services. The Tribunal therefore held that the services were not exported as they were consumed in Kenya and were therefore subject to VAT.

46. The Respondent submitted that in this case, the actual consumers of the services offered by the Appellant were the channel partners or end customers who purchased Oracle products in Kenya.

47. The Respondent further sought to distinguish the case of **Commissioner of Domestic Taxes V Total Touch Cargo Holland** which the Appellant sought to rely on in its Statement of Facts. In that case, the Commissioner did not identify the consumer of the services. However, this is not so in the current case of the Appellant as the Respondent has identified the consumer to be the channel partners' customers influenced to purchase Oracle Solutions as a result of the activities of the Appellant.

48. In response to the assertion by the Appellant that the Respondent wrongly imputed compensation to the Appellant on sales made by Oracle Technology Systems Limited in Kenya, the Respondent submitted that the Appellant did not provide information/evidence to the Respondent hence it opted to use its best judgement.

49. Further that Section 13(1)(b) of the VAT Act provides that the taxable value of a supply between related parties should be the open market value of the supply. This means that if the transaction between the Appellant and its head office was at arm's length, the Appellant would have invoiced for the service at market value.

50. Furthermore, that the cost incurred by the Appellant in its operations in Kenya is recouped through the pricing of commodities by OSL. The consideration therefore given to OSL for the sale of the products includes the price for the service that the branch had offered to the channel partners and third-party end users and thus, the Appellant is entitled to compensation.

51. In response to the assertion that the Respondent failed to take into account the double taxation effect of its tax demand on the services provided to OSL, the Respondent submitted that in an arm's length transaction, OSL would only have reported the income less the compensation to the Appellant and thus only paid VAT for part of income. There would be no double taxation. In addition, OSL 'exported' its products and exports are zero rated so as to allow the importer to pay taxes to the destination country.

52. The Respondent further noted that Section 41 of the Income Tax Act is not applicable to the Appellant since Kenya does not have a Double Tax Treaty with Cyprus. In the absence of a treaty, the Appellant has no relief from double taxation.

Respondent's Prayers

53. The Respondent prays that the Tribunal considers the case and finds that: -

    i. The Commissioner's Objection Decision on VAT assessment was valid.
    ii. The Appeal is dismissed with costs to the Respondent.

ISSUES FOR DETERMINATION

54. After considering the Memorandum of Appeal, the Statement of Facts filed separately, the submissions and the evidence of the witnesses, the Tribunal has narrowed down the following as the issues for determination:

    i. Whether the Respondent wrongly treated the dealings between the Appellant and Oracle Systems Limited as constituting a supply of services for VAT purposes.

    ii. Whether the Respondent wrongly demanded VAT on services used and consumed outside Kenya.

ANALYSIS AND DETERMINATION

i) Whether the Respondent wrongly treated the dealings between the Appellant and Oracle Systems Limited as constituting a supply of services for VAT purposes.

55. In the case at hand, the Appellant, the Kenyan branch of the OSL, provided services to OSL. The Respondent avers that the Appellant should have accounted for VAT on the services. The Appellant on its part argues that there is no service as a branch and its head office are treated as one. It argues, in the alternative, that the services rendered to OSL is an export of service and should therefore be zero-rated.

56. In addressing its mind to the question of whether there is a taxable supply between the Appellant and its head office, the Tribunal looked at various provisions of the VAT Act. Section 5(1)(a) of the VAT Act which is the charging Section provides that:

"(1) A tax, to be known as value added tax, shall be charged in accordance with the provisions of this Act on—"

(a) a taxable supply made by a registered person in Kenya;

57. Thus, according to Section 5, for VAT to apply:

i. there must be a taxable supply;

ii. it must have been made by a registered person; and

iii. It must have been made in Kenya;

58. Section 2 of the VAT Act goes on to define "supply of services" as *anything done that is not a supply of goods or money, including—*

(a) the performance of services for another person;

(b) the grant, assignment, or surrender of any right;

(c) the making available of any facility or advantage; or

(d) the toleration of any situation or the refraining from the doing of any act;

59. According to the above provision, a supply is only a supply when it is performed for another person. Section 2 of the VAT Act defines a person as

"...an individual, company, partnership, association of persons, trust, estate, the Government, a foreign government, or a political subdivision of the Government or foreign government;"

60. The definition of a person includes an individual, company, partnership, association of persons, trust, estate, Government but is silent on whether branches are part of a person. It has been held in various cases that tax laws must be interpreted strictly. This was the position in **Republic v Kenya Revenue Authority & another Ex-parte Fontana Limited [2014] eKLR where Justice Odunga held:**

"In Tanganyika Mine Workers Union vs. The Registrar of Trade Unions ***[1961] EA 629,*** *it was held that where the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it but ought rather to take care that no-one is brought within it who is not brought within it in express language."*

61. Therefore, the Tribunal is bound by the provisions of the law at the time. As the High Court stated in **Republic V Commissioner of Domestic Taxes Large Taxpayer's Office Ex-Parte Barclays Bank of Kenya Ltd [2012] eKLR** in which Majanja J, stated as follows on the guiding principles of interpreting tax legislation:

> *"The approach of to this case is that stated in the oft cited case of* ***Cape Brandy Syndicate v Inland Revenue Commissioners*** **[1920] 1 KB 64** *as applied in* ***T.M. Bell v Commissioner of Income Tax*** **[1960] EALR 224** *where Roland J. stated, "...in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing it to be implied. One can only look fairly at the language used... If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."*
>
> *14. As this case concerns the interpretation of the* ***Income Tax Act****, I am also guided by the dictum of Lord Simonds in* ***Russell v Scott*** **[1948] 2 ALL ER 5** *where he stated, "My Lords, there is a maxim of income tax law which, though it may sometimes be*

overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him" adopted in ***Stanbic Bank Kenya Limited v Kenya Revenue Authority*** **CA Civil Appeal No. 77 of 2008 (Unreported) [2009] eKLR** *per Nyamu JA (See also* ***Jafferali Alibhai v Commissioner of Income Tax*** **[1961] EA 610,** ***Kanjee Naranjee v Income Tax Commissioner*** **[1964] EA 257).***"*

62. Based on our interpretation of Section 2 in its definition of a supply of service and the silence of the Act on whether a branch is a person, for VAT to have applied in this transaction, the Appellant had to have provide the services to another person. The issue of whether a branch is separate from its head office was dealt with in the case of **Jane Wambui Weru Vs Overseas Private Inv. Corp & 3 Others [2012] eKLR** where the court held inter-alia that:

"The process of registration of a company incorporated outside Kenya under part X of the said Act, in my view is for the purposes of giving access to the foreign company to trade in this country. It is not and cannot be another mode of incorporation of a company. To argue otherwise would lead to absurd situations where foreign registered companies would simply facilitate their registration under Part X aforesaid and when faced with claims deny liabilities on the ground that the local company is a different legal entity... It is my prima facie view, therefore, that a company registered under Part X of the Companies Act, Cap 486, is not a distinct and separate legal entity from its mother company."

63. We agree with the position of the High Court **in Jane Wambui Weru** (supra) that a branch and its parent are one and cannot be treated as separate legal entities. The Court of Appeal of Grenada in **The Appeal Commissioners (Appellant) v The Bank of Nova Scotia (Respondent) [2013] UKPC** was faced with a similar situation where payments were made by the Grenadian branch of a Canadian bank to its head office by way of reimbursement of expenses. As is in the Kenyan case, the definition of persons under their VAT Act did not include branches. In finding that there cannot be a payment between a branch and its head office, the court held that:

> *"The natural meaning of the words used by section 50(1) is that there must be a payment by one person to another. Mr Griffiths QC suggested that a transfer of funds by one person from one account to another could be described as a payment by a person to a person. In the Board's view that is not a natural use of language. Nor does he gain any support from the acceptance in the agreed statement that what happened in this case was "a payment". That is a perfectly apt word to use to describe a transfer of funds within a single organisation, but that does not make it a payment by a person to a person. The Board agrees with Dr Denbow SC that the terms of the definition of "person" run counter to the Appeal Commissioners' arguments. The specific inclusion of a "company" makes it difficult to argue that the draftsman intended without express reference to include a mere part of a company."*

64. The European Court of Justice tackled a similar issue in **Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v FCE Bank plc (Case C-210/04).** In the case, FCE IT was an Italian branch of FCE Bank, a company established in the United Kingdom whose objects include supplying financial services exempt from VAT. FCE IT received supplies of services from FCE Bank in the form of consultancy, management, staff training, data processing and

the supply and management of application software. It claimed repayment of the VAT on those supplies. The court in reaching its judgement found that:

> *"...a fixed establishment, which is not a legal entity distinct from the company of which it forms part, established in another Member State and to which the company supplies services, should not be treated as a taxable person by reason of the costs imputed to it in respect of those supplies."*

65. The import of the above Judgements is that branches are deemed to be one and the same person as the head office and payments between them cannot be seen as payments between two persons. The current wording of the VAT Act provides that services must be performed by one person for another person. In this case, since the branch and the head office are deemed to not be separate entities, then it is impossible for the condition to be fulfilled.

66. Guided by the provisions of the VAT Act as well as the decisions in the above discussed cases, we are of the view that since the Appellant and its head office were not separate persons then there could not have been a supply of services as envisioned under the VAT Act. Accordingly, there was no taxable supply.

ii) Whether the Respondent wrongly demanded VAT on services used and consumed outside Kenya.

67. Having found that there was no taxable supply, we find that the question of whether the services were exported is rendered moot.

FINAL DECISION

68. The Tribunal makes the following Orders:

    i. The Appeal as to the confirmation on the VAT assessment hereby succeeds.

    ii. The part of the Respondent's Objection decision of 3rd January 2019 confirming the assessment and demanding VAT is hereby set aside.

    iii. Each party to bear its own costs.

69. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** on this **16th** day of **April, 2021.**

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ERIC N. WAFULA
CHAIRMAN

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CATHERINE N. MUTAVA
MEMBER

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ABRAHAM K. KIPROTICH
MEMBER

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GABRIEL M. KITENGA
MEMBER